80-728

NO.

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT COLETTI,

Petitioner,

-v.-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented for Review

1. Does the Confrontation Clause of the Sixth Amendment permit the admission of hearsay evidence, deemed reliable by the trial court, entirely without regard to whether the hearsay evidence is "crucial" to the prosecution or "devastating" to the defense, and entirely without regard to the proportion of the hearsay evidence relative to the other evidence in the case?

2. Should this Court resolve a split of authority among the courts of appeals regarding the previous question?

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No.

In the Supreme Court of the United States
October Term, 1980

ROBERT COLETTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Robert Coletti petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*) is not reported. The opinion of the District Court (App. B, *infra*) is not reported.

Jurisdiction

The judgment of the Court of Appeals was entered on September 4, 1980, the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Constitutional Provision Involved

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

On October 10, 1979, Indictment No. 79 Cr. 727 was filed in the United States District Court for the Southern District of New York, charging petitioner together with 8 others with having violated federal statutes dealing with the theft of goods from interstate shipments.

At trial, the Government's case against petitioner consisted almost exclusively of the testimony of a paid professional informant, Albert Katno, together with certain post-conspiracy tape recordings made of a non-testifying codefendant, Michael Nicolo (see Appendix C, *infra*).

Katno testified as follows:

He and Michael Nicolo had for 13 years bought stolen merchandise from each other (Tr. 138-39). During January, 1977, Nicolo solicited his help in securing "drops" (*i.e.*, storage garages) for stolen tractor-trailers (Tr. 139-44). Katno contacted petitioner, who agreed, for a fee, to secure "drops" (Tr. 145-50).

During several meetings among Katno, Nicolo and petitioner at petitioner's apartment, petitioner agreed to secure "drops" for a certain date, and expressed an interest in purchasing stolen coffee (Tr. 152-54, 157-63).

Nicolo introduced Katno to the other defendants on trial, including Frank Bolettieri, as participants in the proposed truck hijacking (Tr. 165-67, 192, 195). Nicolo later advised Katno that

the first planned hijacking had been aborted (Tr. 204).

At Bolettieri's request, Katno requested petitioner to provide a "drop" for a subsequent date. Katno and Nicolo again met with petitioner, and were able to persuade him to secure further "drops" (Tr. 211-17). Katno met with petitioner and was given the locations of the "drops." (Tr. 231-32).

On the night of the hijacking, Katno repeatedly attempted to contact petitioner by telephone, but was unsuccessful until approximately 3:30 a.m. (Tr. 237-39).

Katno was later told by Bolettieri and Nicolo that petitioner had not appeared to open the drops. The stolen trucks had been involved in an accident, and there had been a confrontation with the police (242-43).

There was a confrontation, at which Bolettieri blamed petitioner for the aborted hijacking, and demanded that he and Nicolo pay for the loss. Petitioner refused, and was struck in the face by Bolettieri. Petitioner later both threatened to call the police, and secured the aid of others to convince Bolettieri to cease his demands (Tr. 279-87).

During an extensive cross-examination of Katno, the following was established: During 1962-1977, Katno had participated in more crimes involving stolen goods than he could accurately recount; his activities continued unabated even after he had become an informant during 1973 (Tr. 355-63). Law enforcement authorities had intervened to prevent him from being incarcerated on three separate occasions of arrest (Tr. 131-34). During 1962, he had committed perjury before a state grand jury (Tr. 135-36).

As a paid informant, he had received approximately $10,000 from law enforcement authorities. In connection with this case, he had been paid $3,500 by the F.B.I., and $500 by a trucking association (Tr. 138).

He was paid bounty sums contingent upon the amount of recovered hijacked goods, *i.e.*, he was paid for "results" (Tr. 449-56). Consequently, he had been anxious for the hijacking in this case to occur; it could not occur unless he told the hijackers

he had secured a "drop" (Tr. 414-20). He acknowledged that Coletti was not even at home or reachable during the critical hours of the hijacking (Tr. 424).

Katno did not file income tax returns or pay income tax on his bounty money (Tr. 742-55). He had lied to the F.B.I. regarding the expense vouchers he had submitted in connection with this case (Tr. 610-12).

Betty Sprofera, the manager of the apartment building where petitioner lived introduced the floor plan of his apartment, to corroborate Katno's testimony that he had been within the apartment (Tr. 1013-14).

The second principal Government witness, William Gabler, testified regarding incriminating conversations he had had with several of the defendants, and authenticated tape recordings of those conversations. The tape recordings were introduced in evidence (Tr. 1145-70).

Gabler did not identify petitioner.

Finally, over objection by petitioner's counsel, undercover police officer John Alvino authenticated and introduced in evidence tape recordings of post-conspiracy conversations he had had with Michael Nicolo (Tr. 1342-52). The tape recorded conversations directly inculpated petitioner.

Nicolo, who had pleaded guilty prior to trial and been severed from the case, asserted his Fifth Amendment privilege. He did not testify, and was unavailable for cross-examination (see Tr. 1302-22).

Reasons for Granting the Petition

This case presents an important constitutional issue deserving of attention by this Court: whether the Confrontation Clause of the Sixth Amendment permits the introduction of hearsay evidence, deemed reliable by the trial court, entirely without regard to whether the hearsay evidence is "crucial" to the prosecution or "devastating" to the defense, and entirely without regard to the proportion of the hearsay evidence relative to the other evidence in the case.

In addition to its intrinsic significance, this issue requires the attention of this Court in order to resolve a conflict of authorities among the courts of appeals.

The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant's right "to be confronted with the witnesses against him." This constitutional right inheres in the determination of the Framers of the Constitution to eliminate "trial by affidavit," *California v. Green,* 399 U.S. 149, 156 (1970). It is "basically a trial right . . . [which] includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness." *Barber v. Page,* 390 U.S. 719 (1968); *Douglas v. Alabama,* 380 U.S. 415, 418 (1965).

The right of confrontation contemplates "a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Ohio v. Roberts,* __U.S.__, 65 L.Ed.2d 597, 606 (1980), quoting *Mattox v. United States,* 156 U.S. 237, 242-43 (1895).

As this Court has repeatedly noted, "[t]here are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas,* 380 U.S. 400, 405 (1965); *Kirby v. United States,* 174 U.S. 47, 55-56 (1899).

This Court has recognized the competing governmental interest in effective law enforcement, and that the principal "mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans,* 400 U.S. 74, 89 (1970), quoting *California v. Green,* supra, 399 U.S. at 161.

Thus, in instances in which the "indicia of reliability" of hearsay evidence are sufficiently trustworthy, the evidence may be put before the jury, *Dutton v. Evans, supra,* 400 U.S. at 89, provided "there is no material departure from the general rule." *Snyder v. Massachusetts,* 291 U.S. 97, 107 (1934).

In *Dutton v. Evans, supra,* this Court sustained a criminal conviction notwithstanding the admission of hearsay evidence where the evidence in question was "of peripheral significance at most," and was neither "crucial" to the state's case nor "devastating" to the defense. 400 U.S. at 87.

Accordingly, in the general body of authority that has descended from *Dutton,* the primary focus has been on the *minimal* significance of the hearsay evidence in relation to the entirety of the state's proof. The standard that has been generally adopted is the "crucial"—"devastating" language of *Dutton,* or the analogous analysis posed in *Douglas v. Alabama, supra,* 380 U.S. at 420, whether the evidence "added critical weight" to the state's case. *E.g., United States v. Balano,* 618 F.2d 624, 627 (10th Cir. 1980), *petition for cert. pending; Rado v. Connecticut,* 607 F.2d 572, 579 (2d Cir. 1979); *United States v. Blakey,* 607 F.2d 779, 786 (7th Cir. 1979); *United States v. Alvarez,* 584 F.2d 694, 702n.10 (5th Cir. 1978); *United States v. Bailey,* 581 F.2d 341, 351 (3d Cir. 1978); *United States v. Rogers,* 549 F.2d 490, 500 (8th Cir. 1976), *cert. denied,* 431 U.S. 918 (1977); *United States v. Yates,* 524 F.2d 1282 (D.C. Cir. 1975).

In real measure, this analysis was necessitated by the need to reconcile the encroachment of hearsay evidence upon the basic right of cross-examination, in the recognition that the Confrontation Clause and the hearsay evidence rule are not congruent principles, *California v. Green, supra,* 399 U.S. at 155-56.

A body of authority has developed which is in direct conflict with these authorities and with their recognition that while realiability may dispense with a hearsay objection, *see* Fed. R. Evid. 804(b)(5), it does not conclusively dispose of the confron-

tation issue. In *United States v. West,* 574 F.2d 1131, 1138 (4th Cir. 1978), and *United States v. Garner,* 574 F.2d 1141 (4th Cir. 1978), *cert. denied,* 439 U.S. 936 (1979), the Court of Appeals for the Fourth Circuit explicitly held that reliability *alone* was sufficient to obviate confrontation, without regard to the quantum of the hearsay evidence in relation to the entirety of proof.

These decisions were written over the stinging dissent of Judge Widener of that Court, who cogently observed that the right of confrontation historically contemplated far more than a mere assessment of the reliability of the evidence, and that reliability alone could not obviate cross-examination. 574 F.2d at 1138. Judge Widener's dissent echoed the fears of Mr. Justice Marshall, expressed in his dissenting opinion in *Dutton v. Evans, supra,* 400 U.S. at 109-11.

Judge Widener's dissent was approved by Judge McKay in *United States v. Balano, supra,* 618 F.2d at 627, who wrote that "[w]e believe, however, that *West* improperly reduces the Confrontation Clause to a mere consideration of evidentiary value." Two judges of the *Balano* Tenth Circuit panel, in concurring, found no need to reach Judge McKay's criticism of *West.*

The need for a pronouncement by this Court of the test to govern the admission of hearsay evidence over a Sixth Amendment objection is no place more evident than in the instant case. In assessing the objection of coappellant Bolettieri to the admission of hearsay evidence, the court of appeals, relying upon *Dutton v. Evans, supra,* wrote that the evidence was properly received because it was neither "crucial" nor "devastating."

In assessing petitioner's objection to the self-same evidence, the court of appeals, implicitly recognizing that the evidence did "add critical weight" to the prosecution's case, (see Appendix C), employed a different test in the succeeding paragraph of the same opinion. Eschewing the "crucial"—"devastating" test, the court employed the minority test adopted by the Fourth Circuit in *West:* If evidence is determined to be reliable, the Confrontation Clause is obviated,

notwithstanding the overpowering magnitude of the hearsay evidence in relation to the other proof at trial.

In employing this test on petitioner's appeal, the court of appeals below followed its prior decision in *United States v. Medico,* 557 F.2d 309, 316 (2d Cir.), *cert. denied,* 434 U.S. 986 (1977). In employing the "crucial"—"devastating" test regarding Bolettieri, the court of appeals was following its precedent in *Rado v. Connecticut, supra.*

From the decisions of this Court, it is plain that the admission of reliable hearsay evidence which is neither "crucial" to the state's case, nor "devastating" to the defense does not offend the Confrontation Clause. *Dutton v. Evans, supra,* 400 U.S. at 87. It appears equally plain that a prosecution composed entirely of hearsay proof must fail. *Cf. Brookhart v. Janis,* 384 U.S. 1 (1966); *But see United States v. West, supra.*

Manifestly, there is need for an authoritative pronouncement by this Court of the test to govern cases in which "reliable" hearsay evidence does lend "critical weight" to the prosecution's proof. *Cf. United States v. Garner,* 439 U.S. 936, 939 (1978) (Justices Stewart and Marshall, dissenting from denial of certiorari); *Brown Transport Corp. v. Atcon, Inc.,* 439 U.S. 1014, 1019 (1978) (per Justices White and Blackmun).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A
CIRCUIT COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 4th day of September, one thousand nine hundred and eighty.

PRESENT: HON. WILLIAM H. TIMBERS
HON. ELLSWORTH A. VAN GRAAFEILAND
HON. JON O. NEWMAN
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

VINCENT GUERRA, a/k/a "Jimmy", VITO PUMA, ROBERT COLETTI, FRANK BOLETTIERI, SALVATORE GRAFFAGNINO, a/k/a "Tutti",

Defendants-Appellants.

80-1110

Appeals from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are *affirmed.*

Appellants were convicted, following a jury trial, on charges of theft of copper wire from an interstate shipment, transportation of the stolen copper wire and stolen tractor trailers in interstate commerce and conspiracy, in violation of 18 U.S.C. Sections 659, 2312, 2314, 371 and 2. After the jury's verdict of guilty on all counts, the district court in March 1980 sentenced the five appellants to prison terms ranging from one year and one day to five years, and probation. With the exception of Puma, all appellants are on bail pending appeal.

In admitting testimony from Albert Katno, an FBI informant, about discussions he had with some of the defendants regarding planned hijackings beyond the scope of the indictment, the court properly exercised its discretion. Testimony about subsequent crimes similar to those charged in the indictment is permissible to prove the existence of the charged conspiracy and its membership under Feb. R. Evid. 404(b). Evidence of a subsequent conspiracy has been held admissible in a multi-defendant trial such as the instant one when there is substantial identity of parties in the alleged conspiracies and the method of operation is substantially the same. *United States v. Super,* 492 F.2d 319, 323 (2 Cir. 1974).

In applying Rule 404(b), the court properly weighed the probative vlaue of the "similar act" evidence against the risk of unfair prejudice to the unnamed defendants. *United States v. Figueroa,* 618 F.2d 934 (2 Cir. 1980). The court properly concluded that, because the "spill-over" effect of the testimony was largely limited to bolstering Katno's credibility, the risk of prejudice was minimal. In addition, any undue prejudice to those defendants who were not directly implicated by the "similar act" testimony was effectively minimized by the court's explicit instructions to the jury to consider that testimony only with respect to the defendants who were directly involved. *United States v. Rosenwasser,* 550 F.2d 806, 808-09 (2 Cir. 1977).

The court's ruling admitting the so-called "Blue Fountain Diner" tape also was correct. In response to the defendants'

motion, the court carefully reviewed the tape and eliminated those portions relating to potentially prejudicial "similar acts". Appellants' briefs fail to specify the manner in which that tape may be fairly deemed unduly prejudicial in the form in which it was submitted to the jury.

The Nicolo tape also was admissible, despite the claims of two appellants that their right of confrontation was violated. The court properly ruled that Nicolo's hearsay statement, a detailed account of the crime charged, was admissible as a declaration against penal interest. Fed. R. Evid. 804(b)(3). It cannot be said that the statement, reciting details of the crime that were already part of the record through the testimony of other witnesses who were subject to cross-examination, was either "crucial" or "devastating" with respect to the case against appellant Bolettieri. *Dutton v. Evans,* 400 U.S. 74, 87-89 (1970).

With respect to appellant Coletti, while it cannot be said as readily as in the case of Bolettieri that the Nicolo tapes did not "add critical weight" to the prosecution's case against Coletti, *see Rado v. Connecticut,* 607 F.2d 572, 579 (2 Cir. 1979), nevertheless, since the tape recorded statement was extraordinarily reliable, its admission cannot be said to have violated Coletti's confrontation rights. Nicolo's statement was corroborated by other witnesses, was repeated at his own hearing on his guilty plea to the same charges, and, most compellingly, was made in an atmosphere that was neither coercive nor indicative of a motive on his part to curry favor with the authorities by bolstering the case against appellant Coletti. *See Rado v. Connecticut, supra.*

The court's rulings with respect to appellant Graffagnino's cross-examination of William Gabler did not abuse the "extensive discretion" which we have accorded district judges to limit the scope of cross-examination. *E.g. United States v. Gleason,* 616 F.2d 2, 25 (2 Cir. 1979). At most, it might be argued that the testimony excluded by the court might have suggested that someone other than Graffagnino committed the acts with which

he was charged—and even as to that its probative value would have been dubious at best. In view of the risk that the testimony sought to be adduced would be highly prejudicial to the other defendants, we hold that its exclusion was justified.

Our careful examination of the prosecutor's rebuttal summation satisfies us that it did not prejudice appellants' rights. The prosecutor was plainly entitled to comment on Guerra's failure to challenge the factual content of the government's case. *United States v. Bubar,* 567 F.2d 192, 199 (2 Cir.), *cert. denied,* 434 U.S. 872 (1977). Appellant Graffagnino has not shown that the government mischaracterized his summation; and in any event his failure to object at the trial to the court's curative instruction forecloses his right to challenge the adequacy of that instruction on appeal. Fed. R. Crim. P. 30.

Graffagnino's claims with regard to the court's instructions to the jury also are without merit. The court's statement regarding the prosecution's failure to call Agent Morrill clearly was within the court's discretion, as it was necessary to clarify appellant's own misstatements of the record which contradicted the court's prior instructions. The court's instructions about Katno's credibility were adequate. *See United States v. Provenzano,* 615 F.2d 37, 46 (2 Cir. 1980).

We affirm the convictions of all appellants on all counts upon which they were convicted. We order that the mandate issue forthwith.

s/
William H. Timbers
United States Circuit Judge

s/
Ellsworth A. Van Graafeiland
United States Circuit Judge

s/
Jon O. Newman
United States Circuit Judge

APPENDIX B
DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRANK BOLETTIERI, RUDOLPH VILHOTTI, ROBERT COLETTI, SALVATORE GRAFFAGNINO, VINCENT GUERRA, MARYANNE GRAFFAGNINO LYNCH, VITO PUMA and LOUIS FELICE,

Defendants.

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79 Cr. 727 (RWS)

OPINION

APPEARANCES

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SWEET, D.J.

Defendant Michael Nicolo entered a plea of guilty to counts one and three of the instant indictment on December 6, 1979, and he is scheduled to be sentenced on January 17, 1980. The government now indicates that it intends to offer into evidence certain out-of-court statements made by Nicolo inculpating the defendants.

Specifically, the government's offer includes: 1) portions of two tape recorded conversations between Nicolo and a man Nicolo did not realize was an undercover narcotics officer made in April, 1977; 2) a statement given to New York City detectives by Nicolo on the way to the courthouse at the time of arrest in March, 1978; and 3) statements made by Nicolo in open court on December 6, 1979, in connection with his plea. The government contends that these out-of-court conversations are admissible as statements against penal interest[1] under Fed.R.Evid. 804(b)(3).[2] Defendants oppose the introduction of these statements both on the ground that they are not against penal interest and because they would be deprived of their sixth amendment right to confront the witnesses against them.

In order for a statement to be admissible as an exception to the hearsay rule under Rule 804, the declarant must be unavailable. "Unavailability" includes situations in which the declarant is exempted by a ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement. Fed.R.Evid. 804(a)(1). On January 3, 1980, Nicolo's attorney represented to the court that if called to the stand, his client would invoke his fifth amendment privilege. In the absence of any opposition from defendants, this court made a finding of unavailability at that time.[3]

Although Rule 804(b)(3) does not expressly impose a requirement that the declarant have first hand knowledge of the facts to which his statements relate, that requirement was imposed in *United States v. Lang, supra,* 589 F.2d at 97-98. *See also* 4 Weinstein's Evidence para. 804(b)(3)(4)(1979). Taken together, the statements indicate that Nicolo had personal knowledge of the events he discussed. However, leave is granted to the defendants to renew their objection to specific statements on the basis of the record as it stands at the time the government seeks to introduce such statements.

There seems to be no real issue as to whether the statements made to the undercover agent—in effect admitting to criminal liability—were against Nicolo's penal interest. Similarly, the statements made during the plea allocution undeniably subjected him to criminal liability. *Cf. Rado v. Connecticut,* No. 78-1113 (2d Cir. Oct. 3, 1979), slip. op. at 4992 (plea allocution treated as statement against penal interest).[4] Finally, although there is considerable discussion regarding whether a post-arrest statement made while in the custody of agents is actually against penal interest,[5] the March, 1978, statement is on its face against penal interest, and will be considered so for the purpose of this analysis.[6]

As a practical matter, the question of whether these out-of-court statements constitute exceptions to the hearsay rule under the Federal Rules of Evidence is not dispositive of the issue of their admissibility. The Confrontation Clause serves many of

the same values as the rule against hearsay, but they are not necessarily congruent principles. The admission of an extra-judicial statement pursuant to a recognized hearsay exception may nonetheless violate the Confrontation Clause; conversely, the admission of such a statement in violation of hearsay rules does not necessarily result in denial of confrontation rights. *California v. Green,* 399 U.S. 149, 155-56 (1970); *Rado v. Connecticut, supra,* slip. op. at 4987n.4.

The sixth amendment right of a defendant to be confronted with the witnesses against him is usually preserved by providing the defendant with an adequate opportunity to cross-examine the state's witnesses. *Douglas v. Alabama,* 380 U.S. 415, 418 (1965). There may be instances, however, in which "indicia of reliability" are so strong that an out-of-court statement may be placed before the jury despite the absence of an opportunity for the defendant to confront the declarant. *See Dutton v. Evans,* 400 U.S. 74, 89 (1970) (plurality opinion).

In addition to determining whether the statements have sufficient "indicia of reliability" to permit their introduction into evidence, this court must ascertain also whether they are "crucial" to the state's case against the defendants, *Douglas v. Alabama, supra,* 380 U.S. at 419, or "devastating" to the defendants' defense. *Bruton v. United States,* 391 U.S. 123, 136 (1968); *Rado v. Connecticut, supra,* at p. 4989; *United States v. Wright,* 588 F.2d 31, 38-39 (2d Cir. 1978), *cert. denied,* 99 S.Ct. 1236 (1979); *United States v. Puco,* 476 F.2d 1099, 1103 (2d Cir.), *cert. denied,* 414 U.S. 844 (1973). Not having heard the evidence, this court cannot yet determine whether Nicolo's out-of-court statements would be "crucial" or devastating" in this case. Although the court has been informed that a paid government agent will testify, it cannot yet assess the strength of that witness's testimony. Consequently, the government will not be permitted to introduce any of Nicolo's statements until the court has the opportunity to determine the existence of any corroborating evidence and the potential impact of these out-of-court statements on the outcome of the trial.

Once that determination is made, the court must consider the circumstances under which the statements were made in order to ascertain the reliability of Nicolo's statements and the likelihood that he misrepresented the facts. *Dutton v. Evans, supra,* 400 U.S. at 89; *Rado v. Connecticut, supra.* The statements made to the undercover agent in April, 1977, exhibit the classic indicia of reliability. Nicolo made the statements during and very soon after the criminal acts alleged in the indictment. *United States v. Wright, supra,* 588 F.2d at 38. He made them to an acquaintance to whom he had no reason to lie. *See generally Dutton v. Evans, supra,* 400 U.S. at 87, 89.

Although this court is somewhat less convinced of the inherent reliability of statements made during a plea allocution, the Second Circuit has found that a statement in such a setting carries sufficient "indicia of reliability" to overcome a confrontation clause claim. *Rado v. Connecticut, supra.* In making this finding, the court noted that there was also substantial evidence corroborating such statements, and this court will consider the existence of such evidence in making an ultimate determination about the realiability of Nicolo's statements.

Finally, this court finds on the record thus far that "indicia of realiability" are lacking in Nicolo's statement made to the detectives at the time of his arrest. The detective's notes from that conversation reveal that Nicolo stated that he would cooperate in this case and others if he were granted witness protection. In light of this offer, there is little doubt that declarant was interested in currying favor with the government. *See generally, Rado v. Connecticut, supra,* slip op. at 4992. Under the circumstances, his statements about the other defendants while in custody may have been colored by his obvious self interest, and seem to lack the requisite trustworthiness to overcome confrontation clause objections. *Compare United States v. White, supra,* 553 F.2d at 313, (statements trustworthy where declarant not in custody and statements made two weeks after arrest). Consequently, absent strong corroborative evidence the

government will not be permitted to introduce at trial the statements made to those detectives.

IT IS SO ORDERED:

s/
Robert W. Sweet
U.S.D.J.

Dated: New York, New York
January 9, 1980

FOOTNOTES

1. The Government has suggested no other ground on which these statements would be admissible, and indeed, none seems to exist. Although the statements made in April, 1977, were apparently made during the conspiracy, they are not admissible under Fed.R.Evid. 801(d)(2)(E) because they were not made in furtherance of the conspiracy.

2. Fed.R.Evid. 804(b)(3) provides:

Statement against interest. A statement which was at the rime of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

3. Defendants now argue that Nicolo is not truly "unavailable" because he could be granted use immunity by the government. This argument was considered and rejected in *United States v. Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978).

4. At least one defendant contends that the statements in the allocution cannot be viewed as against penal interest because at the time of the plea, Nicolo was not subjecting himself to additional criminal liability. Not only does this argument ignore the dictum in *Rado v. Connecticut, supra,* but it fails to consider that there are open counts in the indictment that have not yet been dismissed.

5. *See* Advisory Committee Note to Rule 804(b)(4) [enacted as 804(b)(3)]; *United States v. Lang, supra,* 589 F.2d at 97; *United States v. White,* 553 F.2d 310, 313n.4 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977); 4 Weinstein's Evidence, *supra,* at para. 804(b)(3)[03].

6. Rule 804(b)(3) does not, by its language, necessarily limit the statements against penal interest to circumstances in which there is no motivation to lie. Judge Weinstein seems to state the best approach to situations in which statements made be made under coercive circumstances when he suggests that Rule 403 may be read in conjunction with Rule 804(b)(3) to exclude statements if they are found to be inherently unreliable because the particular declarant was attempting to curry favor with the government. 4 Weinstein's Evidence, supra, para. 804(b)(3)[02] at 804-98 and 804-99.

APPENDIX C
EXCERPT FROM GOVERNMENT SUMMATION

". . . item of corroboration: Michael Nicolo tells the same story in a tape recorded conversation. What does he say?

'You be the first one, anything that comes, you be the first one. I [expletive deleted (e.d.)] up with a [e.d.] guy. Made more people send down the people instead of [e.d.], leave the guy alone, he ought to go away this [e.d.]. I asked for four drops, company's got four drops, we had four trailers coming in, first come. Four hundred thousand dollars worth of [e.d.] stuff. I had two trailers only so the trailers are on the way down and (unint.) talked to Coletti he says okay, I'll call the guy up, look the trailers are coming down, he says all right. Send two on Ninth Street, and two in the Bronx. So the ones on Ninth Street I send a guy to meet the guy. He the people and ah I went with him to the Bronx, so when the tractor-trailers come in, he says what's in the trailers: What the [e.d.] do I know, so must be good so one trailer guy comes over he says you got nickels there, copper.

'He says I can't handle that. He locked me out, we lost two trailers in the Bronx, Boston Post Road. We left the [e.d.] trailer, four hundred thousand dollars.'

"Katno didn't know that Nicolo would make those statements, either.

"Nicolo in the April 11th tape he adds to it: 'That's it you know. I never—If it was whiskey, I already had it sold. And I said to him—The trucks came in at 7:00 in the morning.—Trucks come in and go by the diner. Says what's in it? So the guy told him it's nickel.—by that time the [e.d.] cops were on the way. Some guys are going to get pinched because cops are there I lost $400,000.'

"Detective Alvine says: 'Where are you gonna off load something like that?'

"Nicolo says, 'You know what that nickel is worth? How much—is? You're nobody, we're nobody—but he came up with

a lot of names. We grab him and say look—come up with $15,000 expense money. He wasn't going to do it. We gave him a [e.d.] beating." (Tr. 1479-80).

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No. 80-728

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT COLETTI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the admission of an out-of-court statement against the penal interest of an unavailable witness, pursuant to Rule 804(b)(3) of the Federal Rules of Evidence, violated petitioner's Sixth Amendment confrontation rights.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1980. The petition for a writ of certiorari was filed on November 3, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of stealing copper wire from an interstate shipment, in violation of 18 U.S.C. 659; transportation of the stolen copper wire and of stolen tractor-trailers in interstate commerce, in violation of 18 U.S.C. 2312 and 2314; and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] He was sentenced to three years' imprisonment, to be followed by a three-year probation term. The court of appeals affirmed (Pet. App. A).

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[1]Co-defendants Frank Bolettieri, Vincent Guerra, Vito Puma and Salvatore Graffagnino were also convicted on all four counts.

1. The testimony at trial showed that in January 1977, Michael Nicolo[2] told FBI informant Albert Katno that some people were planning to hijack four tractor-trailers and were looking for storage places in which to conceal them. Katno, who had purchased stolen goods from Nicolo on numerous past occasions, offered to help Nicolo locate "drops" for the stolen goods. Katno thereafter sought petitioner's assistance. Petitioner expressed an interest in buying stolen goods, preferably coffee, and agreed to help Katno in obtaining the drops. Petitioner subsequently informed Nicolo that he could provide one drop in the Bronx for $300 per trailer and one in Brooklyn for $1,000 for two trailers. Petitioner stated that he would provide the location of the drops when the trailers arrived in New York (Tr. 138-154).

Following a change in date of the planned hijack, petitioner obtained a new drop in Connecticut where all four tractor-trailers could be hidden at a cost of $1,200. When attempts to hijack the tractor-trailers were unsuccessful, Katno asked petitioner to locate a drop for a hijacking a few weeks later. Petitioner agreed to supply the original Bronx and Brooklyn drops, on the condition that the drops be paid for even if they were not used (Tr. 159-167, 203-204, 209-212, 217-218).

On March 5, 1977, co-defendants Bolettieri, Puma, Guerra and Graffagnino, along with three other individuals, broke into a freight yard in Seekonk, Massachusetts. By checking the papers in the bill box and cutting the seals on several of the trailers, they determined that the best loads were two trailers containing copper wire. When apprised of this, petitioner informed Katno that he did not wish to purchase copper wire. Upon learning of petitioner's lack of interest in the wire, co-defendant Bolettieri and his cohorts broke into another Massachusetts freight yard and investigated the available loads, but failed to discover any better goods. Guerra so advised Nicolo, who instructed him to bring the copper wire loads to New York. Nicolo and Katno thereafter told petitioner that the hijacked trailers contained loads of coffee (Tr. 227-237, 310-312, 321-322, 800-801, 811-812, 823-825, 1146).

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[2]Prior to trial co-defendant Michael Nicolo entered a plea of guilty to two counts of the indictment.

The seven men in Massachusetts stole the two tractor-trailers that were loaded with copper wire and drove them, accompanied by two "escort" cars, to New York. However, when the driver of one of the escort cars arrived at the Bronx drop and informed petitioner of the trailer's contents, petitioner locked them out of the drop. The two stolen tractor-trailers were later abandoned after one of them was involved in an accident. Thereafter co-defendant Puma and others unsuccessfully sought reimbursement from petitioner for the value of the lost loads (Tr. 242-246, 276-277, 281, 285-287, 312-316, 321-322, 1018-1020, 1058).

2. At trial, the government offered into evidence portions of two tape-recorded conversations between an undercover officer and Nicolo.[3] The recorded conversations took place on April 1 and April 11, 1977, when Nicolo attempted to purchase narcotics from the undercover agent. In the course of these conversations, Nicolo stated that both he and petitioner had participated in the March 5 theft of the trailers. Nicolo described his negotiations with petitioner regarding the drops for four tractor-trailers and also petitioner's refusal to accept delivery of the stolen goods when he discovered that the trucks contained copper and not coffee. In addition, Nicolo related that his co-conspirators blamed petitioner for the loss of the stolen cargo and that they had subsequently assaulted petitioner in an attempt to force petitioner to defray their losses.

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[3]Although petitioner objected to the admission of these tapes, he never suggested that any references to himself be redacted. To the contrary, he insisted that if the tapes be admitted at all, that they be admitted without "the redaction of any word from these tapes or what this man said" (Tr. 1300).

At the close of the government's case, the trial court held that the recorded statements made by Nicolo, who declined to testify at trial on Fifth Amendment grounds, were admissible as declarations against penal interest under Fed. R. Evid. 804(b)(3). The court further concluded that the admission of the statements did not violate the Confrontation Clause (Tr. 1311-1317). Observing that the tape recordings merely corroborated other evidence at trial, including the testimony of informant Katno, the court found that the evidence was neither crucial to the prosecution nor devastating to petitioner's defense (*id.* at 1313-1314, 1317). In addition, the court determined that the statements were extremely reliable: the tape recordings, which were strongly corroborated by other evidence, were made in circumstances guaranteeing their trustworthiness (*id.* at 1314-1317).

ARGUMENT

Petitioner contends (Pet. 4-8) that the admission into evidence of the tape recorded conversations between coconspirator Nicolo and an undercover agent violated his Sixth Amendment confrontation rights. Petitioner concedes, however, that the statements fall within the well-settled hearsay exception for statements made against the declarant's penal interest. See, *e.g.*, Fed. R. Evid. 804(b)(3); McCormick, *Evidence* §§ 277-280 (2d ed. 1972). Nicolo was unavailable to testify at trial.[4] Moreover, his statements, which were made in the course of a narcotics transaction and which were corroborated both by the testimony at trial and by Nicolo's statements at the time of his plea of guilty, were both self-inculpatory and trustworthy. Accordingly, the district court did not abuse its broad discretion in admitting those tape recordings under Fed. R. Evid. 804(b)(3). See, *e.g.*, *United States* v. *Garris*, 616 F. 2d 626, 629-633 (2d Cir. 1980), cert. denied, No. 79-6313 (June 16, 1980); *United States* v. *Goins*, 593 F. 2d 88, 91 (8th Cir.), cert. denied, 444 U.S. 827 (1979); *United States* v. *Alvarez*, 584 F. 2d 694, 699 (5th Cir. 1978); *United States* v. *Hoyos*, 573 F. 2d 1111, 1115 (9th Cir. 1978); Advisory Committee Note to Proposed Rule 804(b)(3), 56 F.R.D. 327-328 (1972).

---

[4]Nicolo's attorney informed the trial court that Nicolo would invoke his Fifth Amendment privilege against compulsory self-incrimination if called to testify. Nicolo had not been sentenced at the time of trial, and the conversation in question implicated Nicolo in crimes for which he had not been indicted. The court therefore exempted Nicolo from testifying, thereby rendering him "unavailable" for purpose of Rule 804(a)(2).

For similar reasons, the court of appeals correctly concluded that the admission of these statements did not run afoul of the Confrontation Clause. To be sure, although the hearsay rules and the Confrontation Clause "are generally designed to protect similar values," the two are not congruent. See, *e.g., Dutton* v. *Evans*, 400 U.S. 74, 81-82 (1970) (plurality opinion); *California* v. *Green*, 399 U.S. 149, 155-157 (1970). But constitutionally adequate "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *Ohio* v. *Roberts*, No. 78-756 (June 25, 1980), slip op. 9. Here, moreover, the challenged evidence unquestionably bears sufficient " 'indicia of reliability' " to " 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement' " *Mancusi* v. *Stubbs*, 408 U.S. 204, 213 (1972), quoting *Dutton* v. *Evans, supra*, 400 U.S. at 89. See, *e.g., Ohio* v. *Roberts, supra*, slip op. 16; *California* v. *Green, supra*.

Nicolo's statements against his penal interest were recorded at a time when he had no reason falsely to inculpate himself or others. Compare *United States* v. *Oliver*, 626 F. 2d 254, 261 (2d Cir. 1980); *United States* v. *Love*, 592 F. 2d 1022, 1025 (8th Cir. 1979); and *United States* v. *Bailey*, 581 F. 2d 341, 345 (3d Cir. 1978); with *United States* v. *Lilley*, 581 F. 2d 182, 187-188 (8th Cir. 1978), and *United States* v. *Gonzalez*, 559 F. 2d 1271, 1273 (5th Cir. 1977). His statements, which were based on his personal participation in the events, were corroborated by and consistent with the other evidence at trial, including the testimony of Katno and the various police officers, as well as a tape recorded statement of another co-defendant. Finally, Nicolo reiterated these statements at the time of his guilty plea. In these circumstances, the courts below correctly concluded that the extremely reliable tape recordings of an unavailable witness passed muster under the Confrontation Clause. See, *e.g., Dutton* v. *Evans, supra*, 400 U.S. at 88-89.

Petitioner nonetheless suggests that the statements were inadmissible because they were "critical" to the prosecution and "devastating" to his defense, and that the courts of appeals are in conflict over the application of these tests. At the outset, we note that this Court has never suggested that the devastating or crucial nature of otherwise admissible hearsay evidence is an independent restriction under the Confrontation Clause, rather than being simply one of the factors to be considered in evaluating the reliability of the evidence. See *Ohio* v. *Roberts, supra*, slip op. 8-16; *Dutton* v. *Evans, supra*, 400 U.S. at 87-89. In any event, this case does not afford the Court an occasion to resolve whatever slight differences there may be among the courts of appeals on this question.[5] The district court found (Tr. 1311-1317)—and the court of appeals did not disagree (Pet. App. 3a)[6]—that Nicolo's statements were neither devastating nor crucial. Given the testimony of informant Katno, another co-conspirator, and the surveillance agents, as well as the other tape recordings of co-conspirators admitted at trial, Nicolo's statements were merely cumulative of the other evidence. Further review of this fact-bound question is unwarranted.

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[5]In *United States* v. *West*, 574 F. 2d 1131, 1138 (4th Cir. 1978), the court of appeals stated in dictum that reliable hearsay is admissible under the Confrontation Clause regardless of its devastating or crucial nature. In *United States* v. *Balano*, 618 F. 2d 624, 627 (10th Cir. 1979), Judge McKay, *speaking only for himself* (see *id.* at 633), disagreed with the *West* decision insofar as it apparently suggested that evidence that satisfies Fed. R. Evid. 804(b)(5), the catchall provision for reliable hearsay, necessarily satisfies the Confrontation Clause. There is thus no actual conflict among the courts of appeals at this time. We further note that this case involves hearsay admitted under the well-settled exception for declarations against penal interest and not Rule 804(b)(5).

[6]Petitioner erroneously states (Pet. 7) that the court of appeals rejected the district court's findings on the critical nature of Nicolo's statements. The court of appeals stated, however, that these statements were clearly not crucial or devastating as to petitioner's co-defendant, and that, although the question was closer with regard to petitioner, "since the tape recorded statement was extraordinarily reliable, its admission cannot be said to have violated [petitioner's] confrontation rights" (Pet. App. 3a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1981

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